In the District Court of the United States for the District of Delaware

Civil Action No. 337

JOHN J. CASALE, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

(Filed February 3, 1944)

Appellees, pursuant to Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, move that the decree of the district court be affirmed.

This is a direct appeal from the final decree, dated December 21, 1943, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208). In accordance with a written opinion of the court, this decree dismissed appellant's complaint, which sought to set aside an order of the Interstate Commerce Commission, on the sole ground that the suit was prematurely brought and that the specially constituted district court therefore at that stage

lacked jurisdiction over the subject matter. This order, issued May 14, 1943 by Division 5 of the Commission,[1] dismissed appellant's petition to dismiss its application under the "grandfather" clause of Section 209 (a) of Part II of the Interstate Commerce Act (49 U. S. C. 309 (a)) for a permit to operate as a contract carrier by motor vehicle. An appeal to the Supreme Court was allowed on January 17, 1944, and service of the appeal papers was made upon appellees on or about January 20, 1944.

The case was heard by the district court on the pleadings, various documents, and an agreed statement of facts. From these, the following facts appear:

On February 12, 1936, appellant filed an application with the Interstate Commerce Commission for a "grandfather" permit as a contract carrier by motor vehicle as provided in the statute. In the application, appellant stated that while it carried some freight under contract, its chief business was leasing trucking equipment to shippers and others for the transportation of freight in interstate commerce. On March 29, 1939, appellant filed with the Commission a motion to dismiss its application and an accompanying memorandum in support of the motion in which it was

[1] On August 2, 1943, the full Commission denied appellant's petition for reconsideration of the action of Division 5.

stated that appellant intended to give up all carriage for shippers and to concentrate on the business of leasing equipment to them. There was attached a copy of the proposed leasing agreement which appellant stated it intended to use. Its motion contained the following prayer:

> Applicant respectfully prays that the Commission make and enter an order dismissing its said application conditioned upon the discontinuance of any and all forms of relationships with shippers other than such as may be caused by such form of rental agreement and that the Commission declare to applicant that upon the adoption of that form of rental agreement exclusively, and notification to the Commission to that effect its said application shall be dismissed.

And in the memorandum, appellant stated:

> It is believed that with this reorganization applicant will cease to be a motor carrier for hire if it is such at this time. It seeks, however, determination of that conclusion by this Commission as a condition precedent to the dismissal of its grandfather application and surrender of any right it may have to a permit or certificate. The Commission therefore is respectfully asked to express itself on the matter to the end that applicant may promptly proceed to the negotiation of the new contracts and upon advising the Commission thereof, receive an order dismissing its grandfather application.

On June 11, 1941, certain competing carriers intervened in the case and filed protests in opposition to the granting of a permit to appellant. On June 17, 1941, a hearing was held before an examiner of the Commission, at which appellant offered evidence regarding details of its leasing business. On October 24, 1941, the examiner filed a recommended report finding that appellant was engaged only in the rental business and that this business did not constitute carriage subject to the Act. It was therefore recommended that the application should be dismissed. The Commission, however, on its own motion reopened the case, and further hearings were held before an examiner on October 2, 1942, and April 3, 1943. At the second hearing, appellant moved for unconditional permission to dismiss its application. The same motion was repeated in writing on April 9, 1943. This last motion was then denied by the Commission in its order of May 14, 1943, attacked in the present suit. Appellant asked the court to set aside the order and to restrain the Commission from proceeding further in respect to its application.

The district court found it unnecessary to consider whether the Commission's action on the merits was wrongful, because of its conclusion that at the present stage of the proceedings it lacked jurisdiction to review the Commission's

order.[2] Only the correctness of this jurisdictional determination is here in issue, and it is plain that this question was properly decided. Furthermore, the decree of the district court should be affirmed without argument because the appeal therefrom presents no substantial question.

1. The present order of the Commission, as the district court concluded, falls squarely within the first category of administrative orders held not reviewable under the Urgent Deficiencies Act in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. Thus, it is not a final order, but, in the words of that case (307 U. S. 125, 130, 143), an order which "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," and represents merely "a stage in an incomplete process of administrative adjudication."[3] The situation here is exactly like that in *United States* v. *Illinois Central R. Co.*, 244 U. S. 82 and *United States* v. *Los Angeles & S. L. R.*

[2] The Supreme Court has jurisdiction to review the district court's jurisdictional ruling. *United States* v. *Corrick*, 298 U. S. 435, 440.

[3] The Court pointed out that one of the reasons for holding orders in the first category nonreviewable, was the following (307 U. S. 125, 131):

"Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding."

Co., 273 U. S. 299, cited by the Supreme Court in the *Rochester case* (307 U. S. 125, 130–131) as illustrative of the first category. In the *Illinois Central* case, the Supreme Court held not reviewable an order of the Commission setting a case for hearing despite a challenge to its jurisdiction. In the *Los Angeles & Salt Lake* case, it was held that a final valuation order of the Commission was not reviewable under the Urgent Deficiencies Act. The order there before the court was described in the following language, which is applicable to the order here (273 U. S. 299, 309–310):

> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. * * *

Here, just as in those cases, the Commission's order can have no present effect upon appellant's operations. The present order does not determine appellant's carrier status at all. As the district court observed, "a denial of the motion to dismiss does not call upon plaintiff for anything more, forbid it to do anything, or put it under any burden while the case is in the lap of the Commission." The Commission's proceedings, if al-

lowed to run their orderly course, will ultimately culminate in a final order that appellant is or is not a carrier subject to the Act and is or is not entitled to a permit. Any such order adverse[4] to appellant, will be reviewable *in toto*[5] in appropriate proceedings under the Urgent Deficiencies Act.

2. Particularly analogous here, and supporting the district court's decision that it lacked jurisdiction in view of the present posture of the proceedings, is *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617 (C. C. A. 2), certiorari denied, 297 U. S. 705. There the petitioner had filed with the Securities and Exchange Commission a registration statement, which he was required to keep on file in order lawfully to

[4] In view of appellant's contention that it is not subject to the Commission's jurisdiction at all, any order holding to the contrary would be adverse to appellant, even though the Commission should at the same time grant appellant's application for a permit under the "grandfather" clause. Even a final order of the latter type would be reviewable under the Urgent Deficiencies Act. Thus, in *Cornell Steamboat Co.* v. *United States* (S. D. N. Y., Civil No. 21–35, decided August 2, 1943, unreported), a three-judge district court reviewed and sustained a Commission order granting the plaintiff's application for a "grandfather" certificate as a common carrier by water and overruling its contention that it was not a carrier subject to the Act. This case is now on appeal on the merits to the Supreme Court (No. 384, present Term).

[5] The district court stated that such a review on the merits would include the question of whether appellant had a substantive right to have its application dismissed at its pleasure after hearings had taken place.

offer securities for sale. After the Commission had instituted proceedings to suspend the effectiveness of this registration, the petitioner filed a motion to withdraw the registration statement. The Commission's order denying this motion was held by the circuit court of appeals not to be a final order judicially reviewable under the prescribed statutory appellate procedure.[6] Decisions involving jurisdiction under the Urgent Deficiencies Act have been recognized as "persuasive analogies" in resolving jurisdictional issues under various other statutory appellate schemes. *Federal Power Commission* v. *Metropolitan Edison*

[6] After denying the motion to withdraw the registration statement, the Commission successfully instituted proceedings before the district court for an order requiring petitioner to appear before the Commission's examiner and give evidence concerning the registration statement. These proceedings were consolidated in the circuit court of appeals with petitioner's direct appeal from the Commission's order dismissing his motion. The decision of the circuit court of appeals also affirmed the district court's holding granting the Commission the order sought. Only the latter phase of the case was considered by the Supreme Court on certiorari in *Jones* v. *Securities Commission*, 298 U. S. 1, certiorari having been denied as to the phase of the case relating to petitioner's statutory appeal (297 U. S. 705; 298 U. S. 1, 14). While the Court, in the course of its decision reversing the circuit court of appeals, recognized that petitioner had the substantive right to withdraw his registration statement with the Commission, this does not militate at all against the correctness of the conclusion of the circuit court of appeals that it lacked jurisdiction on petitioner's direct appeal to review the Commission's order refusing permission to withdraw.

Co., 304 U. S. 375, 385. Presumably, the converse is equally true.

3. This order, even if it were otherwise an order reviewable under the Urgent Deficiencies Act, is not reviewable here for the further reason that the complaint does not state a cause of action in equity, either by proof of irreparable injury or otherwise. It was suggested by the Supreme Court in the *Rochester Telephone* case (307 U. S. 125, 136) and definitely held more recently in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 415, that a suit cannot be maintained under the Urgent Deficiencies Act unless the complaint states a cause of action in equity. As previously indicated, the present order of the Commission has absolutely no present effect upon appellant in the conduct of its business. It is impossible now to foretell whether the ultimate order of the Commission will be adverse or favorable to appellant. Appellant, having a "grandfather" application on file with the Commission, can continue its present operations at least until the final order of the Commission, without threat of either civil or criminal proceedings by the Commission.[7] If the ultimate decision is unfavorable, appellant will have an adequate remedy under the Urgent Deficiencies Act. It is well

[7] Section 209 (a) of the Act (49 U. S. C. 309 (a) provides that "pending determination of any such application, the continuance of such operation shall be lawful."

recognized that the existence of a clear and adequate alternative procedure for having certain issues determined deprives an equity court of jurisdiction to determine them. *Cavanaugh* v. *Looney*, 248 U. S. 453, 456; *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *California* v. *Latimer*, 305 U. S. 255, 260.

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

(s.) CHARLES FAHY,
Charles Fahy,
Solicitor General.

(s.) DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
Interstate Commerce Commission.

FEBRUARY 1, 1944.

Certificate of Service

I hereby certify that I served a copy of the attached Motion to Affirm upon the following counsel for appellant, by mailing him a copy thereof this first day of February, 1944: Charles M. Cotterill, Esquire, 70 East 45th Street, New York 17, New York.

Robert L. Pierce,
Robert L. Pierce
Special Assistant to the Attorney General.

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